

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 5, 1995**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2399**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**REALTY WORLD-FIRST  
SECURITY GROUP, INC.,**

**Plaintiff-Respondent,**

**v.**

**WAGNER & HOPKINS, INC.,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Wagner & Hopkins, Inc., appeals a judgment dismissing its counterclaim against Realty World for negligence in its handling of a real estate transaction. The court allowed Wagner & Hopkins to file a counterclaim against Realty World in Realty World's action to recover a commission, but denied Wagner & Hopkins' motion to commence a third-party

action against Realty World's employee, Donald Engum. Wagner & Hopkins then filed a separate third-party action against Engum and sought consolidation of the two actions. The trial court denied that motion. The court found that Wagner & Hopkins owed a commission to Realty World and that Realty World was negligent in its handling of the transaction. The court offset the damages and dismissed the complaint and counterclaim. Wagner & Hopkins argues that the court erroneously exercised its discretion when it refused to allow the filing of a third-party negligence action against Engum and when it refused to consolidate the two actions. Because we conclude that the court properly exercised its discretion and Wagner & Hopkins was not prejudiced by these decisions, we affirm the judgment.

The trial court properly exercised its discretion when it denied Wagner & Hopkins' motion to amend the pleadings to commence a third-party action against Engum. The trial court's discretionary decision must be upheld if there exists a reasonable basis for its ruling. *Howard v. Duersten*, 81 Wis.2d 301, 305, 260 N.W.2d 274, 276 (1977). Under the doctrine of *respondeat superior*, Engum's tortious conduct was attributable to Realty World. *Pamperin v. Trinity Memorial Hosp.*, 144 Wis.2d 188, 198, 423 N.W.2d 848, 852 (1988). Engum's negligence, as imputed to Realty World, was already before the court. The court properly refused to allow amendment of the pleadings to implead a superfluous party, especially under circumstances where that party's attorney had not participated in the first half of the trial and the second half might have to be delayed.

The trial court also properly exercised its discretion when it denied Wagner & Hopkins' motion to consolidate the two actions once it brought its separate action against Engum. In addition to claiming negligence against Engum personally, the second action named Arthur and Chester Wagner as plaintiffs and alleged new causes of action for misrepresentation, unjust enrichment and intentional infliction of emotional distress. Consolidation of these additional claims by and against new parties substantially added to the complexity of the underlying case and would have forced an adjournment of the scheduled trial date to allow additional time for discovery and attorney preparation.

Furthermore, Wagner & Hopkins has not established any prejudice from the trial court's refusal to allow the third party action or

consolidation. Wagner & Hopkins and Chester and Arthur Wagner filed their action against Engum and had their day in court. Contrary to their assertions on appeal, they were not left without a forum in which to litigate their claims. We reject their argument that they were caught in a "procedural nightmare" because Judge Peterson would not allow the third-party complaint or consolidation and Judge Barland granted summary judgment in the separate case they commenced.<sup>1</sup> Because Wagner & Hopkins had received damages for Engum's negligence in the Realty World action, it had no legitimate separate claim remaining against Engum. Therefore, the action would have been properly dismissed regardless of whether it was a third-party complaint and regardless of which court heard the action.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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<sup>1</sup> Judge Barland's dismissal of the separate action against Engum is the subject of appeal no. 94-3400.